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Please find below and/or attached an Office communication concerning this application or proceeding.

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BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

Application Number: 10/633,694
Filing Date: August 05, 2003
Appellant(s): ANDERSON, JEFFREY A.

Harold H. Fox
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed January 5, 2010 appealing from the Office action mailed October 7 2009.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

No amendment after final has been filed.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

5,605,024	Sucato	2-1997

6,205,740	EKERHOLM ET AL	3-2001
5,527,625	BODNAR	6-1996

A copy of the declaration under 37 from Jeffrey A. Anderson filed on November 9, 2006, and relied upon by Appellant in the appeal is attached. The declaration was entered and considered by the Examiner as evidenced on p. 10 of the Office Action mailed on October 7, 2009.

A copy of the declaration under 37 CFR § 1.132 from Roger A. LaBoube filed on September 8, 2007 and relied upon by Appellant in the appeal is attached. The declaration was entered and considered by the Examiner as evidenced on p. 10 of the Office Action mailed on April 2, 2008.

A copy of the declaration under 37 CFR § 1.132 from Francis J. Roost filed on September 8, 2007 and relied upon by Appellant in the appeal is attached. The declaration was entered and considered by the Examiner as evidenced on p. 10 of the Office Action mailed on April 2, 2008.

Exhibit A data and statistical analysis of the use of cold formed steel in the non residential construction (no date) –filed 10/24/07

Exhibits B (Market (2002) in Tons After Applying Factors) (no date) –filed 10/24/07

Exhibit C (Derivation of Weight per Foot (interior wall)), (no date) filed 10/24/07

Exhibit D (AMM Steel Base prices), E(derivation of material Savings) and the Data of Non-Statistical Analysis of the use of Cold Formed Steel in no Residential Construction (no date) filed 10/24/07)

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

The following is a quotation of the second paragraph of 35 U.S.C. 112:

> The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claim 61 is rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. Claim 61 has not clear meaning and is perhaps indefinite with

the use of the following language, "a plurality of reinforcements exclusively in the web elements and two flanges, each flange extending from the web region, and from two, three or five columns of web slots extending along a portion of the length in the web region or at least one of the flanges; wherein the formed metal sheet further includes a closing region extending between the flanges to form a substantially tubular structure." Further, where does this language find support in the specification?

The amendment filed 11/9/06 is objected to under 35 U.S.C. 132(a) because it introduces new matter into the disclosure. 35 U.S.C. 132(a) states that no amendment shall introduce new matter into the disclosure of the invention. The added material which is not supported by the original disclosure is as follows: "the ratio of the distance between adjacent slots prior to expansion to a width of the formed metal sheet prior to expansion is 1:8 or greater".

Applicant is required to cancel the new matter in the reply to this Office Action. Claims 1, 3-15, 44, and 54-55 are rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement. The claim(s) contains subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention. See above.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

Claims 1,3-5,9,11-14, 54-55 are rejected under 35 U.S.C. 103(a) as being unpatentable over Sucato (5605024).

Claim 1.

Sucato et al discloses a metal framing member comprising: a formed metal sheet having a length and including a web region 64 including a plurality of expanded web slots 65 including voids and metal web elements and extending along a portion of the length, wherein the region includes a plurality of reinforcements 66 proximate to the web slots and confined to the web elements and exclusive to the web voids, and each expanded web slot has a length to width ratio of about 2:1 or greater as shown in figure, and Sucato lacks the ratio of the distance between adjacent slots prior to expansion to a width of the formed metal sheet prior to expansion is 1:8 or greater. Applicant has not shown the criticality and relevancy for including these ratios. Applicant has not shown that ratios outside the recited ratios cause the framing member to not function as intended or to function unfavorably. One of ordinary skill in the art would have appreciated providing the proper ration of web slots to voids which would provide the intended framing member with the intended function.

Claim 3.

Sucato discloses the member of claim 1, wherein the formed metal sheet includes a web region 64 and a first flange 62 extending from the web region 64. claim 4.

Sucato et al discloses the member of claim 3, wherein the formed metal sheet further includes a second flange 63 extending from the web region 64 in a direction substantially parallel to the first flange 62.

Claim 5.

Sucato et al discloses the member of claim 3, wherein the web region 64 includes the expanded web slots. See figures 20-21.

Claim 9.

Sucato discloses the member of claim 4, wherein the formed metal sheet further includes a closing region extending the first flange to the second flange to form a substantially tubular structure. See annotations below.

Claim 11.

Sucato discloses that the member of claim 1, wherein each web slot extends along a portion of a length of the member.

Claim 12.

Sucato discloses the member of claim 1, wherein the plurality of web slots is arranged in offset columns substantially parallel to a length of the member. See figures 20-21.

Claim13.

Sucato discloses the member of claim 1, wherein the plurality of web slots form three or more columns of slots along the length of the member. See figures 20-21.

Claim 14.

Sucato discloses the member of claim 13, wherein the plurality of web slots form five or

more columns of slots along the length of the member. See figures 20-21.

Claim 54.

A metal framing member comprising: a formed metal sheet including a plurality of expanded web slots in a region of the formed metal sheet; Sucato does not disclose the expanded web slots are heat treated: but discloses each expanded web slot having a length to width ratio of 2:1 or greater. Sucato lacks the ratio of the distance between adjacent slots prior to expansion to a width of the formed metal sheet prior to expansion is 1:8 or greater. Applicant has not shown the criticality and relevancy for including these ratios. Applicant has not shown that ratios outside the recited ratios cause the framing member to not function as intended or to function unfavorably. One of ordinary skill in the art would have appreciated providing the proper ration of web slots to voids which would provide the intended framing member with the intended function.

Heat treatment is a common process that has been around for many years to strengthen the mechanical metal structure after forming claim 55. Further the structure is not limited to a heat treatment process to form the same; the structure is not limited to the process since the same is shown without the process. Applicant is not claiming a process but a product.

Sucato discloses the member of claim 1, wherein the reinforcements include a dart or dimple 66.

Claims 6-8, 10 are rejected under 35 U.S.C. 103(a) as being unpatentable over Sucato et al (5605024) in view of Ekerholm (6205740)

Claim 6.

Sucato lacks the member of claim 3, wherein the first flange includes the expanded web slots. Ekerholm discloses a framing member with flanges having expandable regions 2 and 3. It would have been obvious to one of ordinary skill in the art to modify Sucato et al to include the framing member with flanges having expanded web slots to provide more adjustment characteristics to the frame as needed.

Claim 7.

With the modification of Ekerholm to Sucato, the member of claim 3, each of the web region and the first flange includes the expanded web slots.

Claim 8.

With the modification of Ekerholm to Sucato et al, the member of claim 5, each of the web region, the first flange and the second flange includes the expanded web slots.

Claim 10.

Sucato discloses the web region includes the expanded web slot and the closing region including the expanded web slots. Ekerholm et al discloses the first flange and the second flange and the closing region includes the expanded web slots. See obviousness rational above for including the Ekerholm reference.

Claims 15, 44, 60-61 are rejected under 35 U.S.C. 103(a) as being unpatentable over Sucato et al (5605024) in view of Bodnar (5527625)

Claim 15.

Bodnar discloses a framing member with voids and reinforcements 100, 102, 104 and additional reinforcements 94/96/98

It would have been obvious to include these reinforcement or flanges to strengthen the form material around the opening or slits.

Claim 44.

Bodnar discloses the reinforcements include a strengthening flange. See obviousness rational above for combining Bodnar with Sucato.

Claim 60.

Sucato discloses a metal framing member comprising: a formed metal sheet having a web region 64 including a plurality of expanded web slots adjacent 65 provided in columns extending in the web region of the formed sheet metal and two flanges extending from the web region 64, wherein the web region includes web elements 65 but lacks and a plurality of reinforcements exclusively in the web elements as shown by Bodnar, see above.

Sucato includes a closing region as shown in the embodiment of figure 2 and 19 with elements 26 and 27 extending the first flange 62 to the second flange 63 to form a substantially tubular structure as shown in figures 2 and 19, and wherein the formed metal sheet further includes a second flange62 extending from the web region in a direction substantially parallel to the first flange 62. See obviousness rational above for combining Sucato to Bodnar

Claim 61.

Sucato discloses a metal framing member prior to expansion comprising: a formed metal sheet having a length and including a web region 64including web elements 65 but lacks a plurality of reinforcements exclusively in the web elements and

Sucato discloses two flanges 62 and 63, each flange extending from the web region 64, and from two slots extending along a portion of the length in the web region; wherein the formed metal sheet further includes a closing region 26/27 extending between the flanges to form a substantially tubular structure. See figure 2 and 19 and the accompanying text

(10) Response to Argument

Applicant previously argued up to the Final rejection of 10/7/09 that the recited ratios were equivalent to the percentages on page 6. Applicant has abandoned this argument and is now stating that the drawings show or illustrate the recited ratios recited or claimed in the independent claims. Specifically applicant argues, "MPEP 2163.02 states that "[t]he subject matter of the claim need not be described literally in order for the disclosure to satisfy the description requirement." (emphasis added). Rather, it is sufficient if the "description clearly allows persons of ordinary skill in the art to recognize that he or she invented what is claimed." Id. MPEP 2163.02 further states that...to satisfy the written description requirement, an applicant must convey with reasonable clarity to those skilled in the art that, as of the filing date sought, he or she was in possession of the invention, and that the invention, in that context, is whatever is now claimed. The test for sufficiency of support in a parent application is whether the disclosure of the application relied upon "reasonably conveys to the artisan that the inventor had possession at that time of the later claimed subject matter." ...The phrase

"the ratio of the distance between adjacent slots prior to expansion to a width of the formed metal sheet prior to expansion is 1:8 or greater" is supported by Figures 1 and 6 of the specification. For example, Figure 6 of the specification illustrates that "the ratio of the distance between adjacent slots prior to expansion to a width of the formed metal sheet prior to expansion is 1:8 or greater."... applicant shows possession of the claimed invention by describing the claimed invention with all of its limitations using such descriptive means as words, structures, figures, diagrams, and formulas that fully set forth the claimed invention... Possession may be shown in a variety of ways including description of an actual reduction to practice, or by showing that the invention was "ready for patenting" such as by the disclosure of drawings or structural chemical formulas that show that the invention was complete, or by describing distinguishing identifying characteristics sufficient to show that the applicant was in possession of the claimed invention..."

Response: As stated in MPEP 2125, PROPORTIONS OF FEATURES IN A DRAWING ARE NOT EVIDENCE OF ACTUAL PROPORTIONS WHEN DRAWINGS ARE NOT TO SCALE. When the reference does not disclose that the drawings are to scale and is silent as to dimensions, arguments based on measurement of the drawing features are of little value. In this application, applicant has not disclosed that the drawings are to scale. Further there is no support in the written specification for the recited ratios, the Specification on page 6 merely recites percentages.

Applicant further argues,... the 35 U.S.C. § 112, second paragraph of claim 61:

"...the Examiner has rejected claim 61 under 35 U.S.C. § 112, second paragraph, as being indefinite. See Office Action at p. 2. Specifically, the Examiner states that "[c]laim 61 has no[] clear meaning and is perhaps indefinite with the use of the language ' ... **a plurality of reinforcements exclusively in the web elements and two flanges, each flange extending from the web region, and from two, three or five columns of web slots extending along a portion of the length in the web region or at least one of the flanges; wherein the formed metal sheet further includes a closing region extending between the flanges to form a substantially tubular structure...** The specification describes that a plurality of slots can be arranged in offset columns substantially parallel to a length of a member... The specification further states that reinforcements in the web elements can include flanges or darts... Figures 3 and 6 further provide support for the phrase "a plurality of reinforcements exclusively in the web elements and two flanges, each flange extending from the web region, and from two, three or five columns of web slots extending along a portion of the length in the web region or at least one of the flanges."

Response:

The specification and original claims fail to discuss the **plurality of reinforcements exclusively in the web elements and two flanges,...** Neither do the drawings illustrate such structure. The reinforcements are only on the web elements and not the flanges. Neither does each flange extending from the web region, and from two, three or five columns of web slots **extending along a portion of the length** in the web region or at least one of the flanges."

Applicant argues:

Sucato refers to "channels or studs for walls of buildings and more particularly to a stud assembly comprising a pair of channels held together by a stiffener at one or more points or places along their length to form a new and improved stud assembly... Sucato further describes that "FIG. 2 illustrates a modification of the prior art structure shown in FIG. 1 wherein channel or stud assembly 25 comprises two members 26 and 27." ... As such, Sucato does not teach or suggest a metal framing member including a formed metal sheet having a length and including a web region including a plurality of expanded web slots including voids and metal web elements and extending along a portion of the length and including a web region including a plurality of expanded web slots including voids and metal web elements and extending along a portion of the length, wherein the region includes a plurality of reinforcements proximate to the web slots and confined to the web elements and exclusive to the web voids, each expanded web slot has a length to width ratio of 2:1 or greater, and the ratio of the distance between adjacent slots prior to expansion to a width of the formed metal sheet prior to expansion is 1:8 or greater.

Response:

Applicant has argued and combined several limitations from more than one claim. Sucato teaches the limitations in claims 1, 3-5, 9,11-14, 54-55 which does not include the voids taught by Bodnar nor the expanded web slots on the flanges as taught by Eckerhom and addressed in a separate rejection. Sucato does teach a metal framing member comprising: a formed metal sheet having a length and including a web region 64 including a plurality of expanded web slots 65 including voids and metal web

elements and extending along a portion of the length, wherein the region includes a plurality of reinforcements 66 proximate to the web slots and confined to the web elements and exclusive to the web voids. Sucato does teach or suggest a metal framing member including a formed metal sheet having a length and including a web region including a plurality of expanded web slots including voids and metal web elements and extending along a portion of the length and including a web region including a plurality of expanded web slots including voids and metal web elements and extending along a portion of the length. Bodnar discloses the reinforcements and there is no support in the specification for the ratios. See new matter rejection above. The web slots being heat treated is a matter of choice not critical to forming the structure nor shown to be critical to forming the structure. Applicant is not claiming a process but a product; the product by process limitation is not critical or relevant since the product is shown and hence the process need not be shown

Applicant further states: "The Anderson Declaration states that "[t]he combination of a plurality of reinforcements proximate to the web slots and confined to the web elements and exclusive to the web voids, each expanded web slot having a length to width ratio of 2:1 or greater, and the ratio of the distance between adjacent slots prior to expansion to a width of the formed metal sheet prior to expansion is 1:8 or greater are necessary to achieve the structure on the web that is not available when these features are not all present in combination... Ekerholm describes "[a]n elongate supporting element [that] has a cross section with a web (9) and two side flanges (10, 11) for the supporting of building panels or the like." See Abstract. Ekerholm does not teach or suggest a metal

framing member including a formed metal sheet having a length and including a web region including a plurality of expanded web slots including voids and metal web elements and extending along a portion of the length and including a web region including a plurality of expanded web slots including voids and metal web elements and extending along a portion of the length, wherein the region includes a plurality of reinforcements proximate to the web slots and confined to the web elements and exclusive to the web voids, each expanded web slot has a length to width ratio of 2:1 or greater, and the ratio of the distance between adjacent slots prior to expansion to a width of the formed metal sheet prior to expansion is 1:8 or greater.'

Response: Regarding the Declaration of Roger A. Laboube:

The declaration does not shows the equivalence of the 1:8 ratio and the specification page 6, line 26. Meaning the information in the declaration does not overcome the new matter rejection nor does it overcome or influence in any way the prior art rejection. Further, there is no nexus between what is disclosed in the declaration and what is recited in the claims.

Regarding the Declaration of Francis J. Roost:

The declaration does not shows the equivalence of the 1:8 ratio and the specification page 6, line 26. Meaning the information in the declaration does not overcome the new matter rejection nor does it overcome or influence in any way the prior art rejection. Further, there is no nexus between what is disclosed in the declaration and what is recited in the claims

Regarding exhibits B (Market (2002) in Tons After Applying Factors), C (Derivation of

Weight per Foot (interior wall)), D (AMM Steel Base prices), E(derivation of material Savings) and the Data of Non-Statistical Analysis of the use of Cold Formed Steel in no Residential Construction. The above documents contain an excessive amount of information and data and some directed to commercial success. The claims of commercial success lacks a direct link and relevance to the claims. Further there is no evidence in the document overcoming the prior art or the new matter rejection. Further applicant does not reference or underline any information within the documents that directly relate to the claim language or provide information in overcoming the new matter rejection.

Regarding the Declaration of Jeffery Anderson:

The above declaration does not discuss the alleged ratios with respect to the drawings nor does this declaration provide support for the equivalence between the ratios and the disclosed percentages in the written specification; This declaration merely speaks of the recited ratios in the specification which do not convert to the recited ratios. The declaration merely states that the ratios are necessary but not critical or relevant to the function of the invention and not how critical to the structure and to what part of the invention.

Applicant argues…Regarding the rejection of claims 6-8 and 10 are unpatentable under 35 U.S.C. §103(a) as being obvious over U.S. Patent No. 5,605,024 to Sucato et al. in view of U.S. Patent no.6,205,740 to Ekerholm:

"Sucato does not teach or suggest a metal framing member including a formed metal sheet having a length and including a web region including a plurality of expanded web

slots including voids and metal web elements and extending along a portion of the length and including a web region including a plurality of expanded web slots including voids and metal web elements and extending along a portion of the length, wherein the region includes a plurality of reinforcements proximate to the web slots and confined to the web elements and exclusive to the web voids, each expanded web slot has a length to width ratio of 2:1 or greater, and the ratio of the distance between adjacent slots prior to expansion to a width of the formed metal sheet prior to expansion is 1:8 or greater…Such a defect is not remedied by Ekerholm either."

Response: Ekerholm is not bodily incorporated into Sucato et al but is cited to show the expanded slots may also exist in the flanges/sides. In response to the above arguments of applicant, the test for obviousness is not whether the features of a secondary reference may be bodily incorporated into the structure of the primary reference; nor is it that the claimed invention must be expressly suggested in any one or all of the references. Rather, the test is what the combined teachings of the references would have suggested to those of ordinary skill in the art. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981). The expanded flanges are to adjust the size of the stud or beam to the specific building project. Ekerholm is not cited to show the recited ratios or the limitations addressed by Sucato.

Regarding claims 15, 44 and 60-61 are unpatentable over 35 U.S.C. §103(a) as being obvious over U.S. Patent No. 5,605,024 to Sucato et al. in view of U.S. Patent No. 5,527,625 to Bodnar, applicant argues:

"Bodnar fails to teach or suggest does not teach or suggest a metal framing member

including a formed metal sheet having a length and including a web region including a plurality of expanded web slots including voids and metal web elements and extending along a portion of the length and including a web region including a plurality of expanded web slots including voids and metal web elements and extending along a portion of the length, wherein the region includes a plurality of reinforcements proximate to the web slots and confined to the web elements and exclusive to the web voids, each expanded web slot has a length to width ratio of 2:1 or greater, and the ratio of the distance between adjacent slots prior to expansion to a width of the formed metal sheet prior to expansion is 1:8 or greater...There is no motivation or suggestion within the references to combine Sucato with Bodnar. The references, alone and in combination, fail to teach the claimed ratio of web element width to unexpanded framing member width.

Response:

Bodnar is not bodily incorporated into Sucato et al. Bodnar like Eckerholm discloses a stud or beam constructed of metal with slots or openings. Bodnar is cited to show the voids around the opening to strengthen the area around the opening. Bodnar is not cited to show limitations addressed/shown by Sucato nor is this references cited to address the ratio limitations.

Regarding Independent claims 60 and 61, applicant argues:

"Sucato refers to "channels or studs for walls of buildings and more particularly to a stud assembly comprising a pair of channels held together by a stiffener at one or more points or places along their length to form a new and improved stud assembly."

...Bodnar describes "[a] metal member having at least one edge formation" with a C-shaped cross section. See Abstract and Figures 2a, 3, 6, 9 of Bodnar as examples. Bodnar does not teach or suggest a metal framing member wherein the formed metal sheet includes a closing region extending the first flange to the second flange to form a substantially tubular structure (see claim 60). Bodnar also does not teach or suggest a metal framing member prior to expansion wherein the formed metal sheet includes a closing region extending between the flanges to form a substantially tubular structure

Response: Again, Bodnar is not bodily incorporated into Sucato et al. Bodnar like Eckerholm discloses a stud or beam constructed of metal with slots or openings. Bodnar is cited to show the voids around the opening to strengthen the area around the opening. Bodnar is not cited to show limitations addressed/shown by Sucato nor is this references cited to address the ratio limitations.

Applicant also argues Evidence of Non-Obviousness,...

"MPEP 2141 states that the "Office policy is to follow Graham v. John Deere Co. in the consideration and determination of obviousness under 35 U.S.C. 103." MPEP 2141 further states that "[a]s quoted above, the four factual inquires enunciated therein as a background for determining obviousness are as follows: (A) Determining the scope and contents of the prior art; (B) Ascertaining the differences between the prior art and the claims in issue; (C) Resolving the level of ordinary skill in the pertinent art; and (D) Evaluating evidence of secondary considerations."

Response:

The scope and contents of the art of all three references are concerned with metal studs having openings; the differences concern themselves with the types of openings and their placement on the stud or beam; one of ordinary skill in the art of beam or studs would have appreciated the differences and motivations for combining the differences for the advantages that would result such as adjustability in size and strengthening the stud and opening; the secondary considerations have not been linked to the recited differences or claim limitations; meaning, the secondary considerations such as commercial success has not been shown to result from the recited ratios, the expandable flanges or the voids around the opening.

For arguments regarding the declarations see above.

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

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